FILED
NOV 13 1956
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 473

PAUL W. HEISEY,
Appellant,

vs.

COUNTY OF ALAMEDA; CITY OF OAKLAND; RUSSELL C. HORSTMANN, as County Assessor of Alameda County; ROGER COIT, as County Treasurer of Alameda County; EDWIN MEESE, JR., as County Tax Collector of Alameda County; CHESTER STANLEY, as Chairman of the Board of Supervisors of Alameda County; CLIFFORD RISHELL, as Mayor of the City of Oakland; THE ROMAN CATHOLIC WELFARE CORPORATION OF SAN FRANCISCO, Intervenor,
Appellees.

APPELLANT'S BRIEF OPPOSING THE INTERVENOR-APPELLEE'S MOTION TO DISMISS.

Appeal from the Supreme Court of the State of California.

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Appellees.

APPELLANT'S BRIEF OPPOSING THE INTERVENOR-APPELLEE'S MOTION TO DISMISS.

Appeal from the Supreme Court of the State of California.

REPLY TO INTERVENOR'S PURPORTED STATEMENT OF FACTS.

Intervenor-appellee's Statement of Facts contains erroneous and misleading remarks. These will be corrected herein by reference to the facts themselves.

I. PLAINTIFF LUNDBERG'S SHOWING OF HIS STATUS AS A CITY AND COUNTY TAXPAYER; OF HIS REPRESENTATION OF CITY AND COUNTY TAXPAYERS AS A CLASS; AND OF THE THREATENED DIRECT PECUNIARY INJURY TO SUCH TAXPAYERS RESULTING FROM PASSAGE OF THE STATUTE GRANTING TAX EXEMPTION SUBSIDIES TO PRIVATE AND RELIGIOUS SCHOOLS.

This is a class suit which was brought by Alfred J. Lundberg as a taxpayer of the City of Oakland and County of Alameda to prevent the loss of tax moneys which was threatened by the city and county officials' declared intention to grant tax exemptions to undercollegiate parochial and church schools pursuant to the 1951 amendment to California Revenue and Taxation Code Section 214. Plaintiff Lundberg clearly put in issue the threatened pecuniary injury to taxpayers as a class by the allegations of his Amended Complaint, which are set forth below:

I.

> At all times mentioned here, plaintiff has been and is the owner of real and personal property located in said defendant County and defendant City, and in the State of California, and a citizen and resident and taxpayer thereof; and assessed for and liable to pay taxes thereon and therein, as provided by law; and within one year before the

commencement of this action has paid taxes thereon and therein.

II.

That the citizen, resident taxpayers of said defendant City and County and of said State number many thousands; that plaintiff and said persons are in the same class; that plaintiff and each and all of said persons are affected by all of the matters and things hereinafter mentioned and are subject to a like injury and damage as the injuries complained of herein; that there are common questions of law and fact affecting their rights, and a common relief is sought; that these persons united in interest with plaintiff are too numerous to make it practical to bring them before the court and that therefore plaintiff brings this action on his own behalf as such owner, resident, citizen and taxpayer, and also in behalf of all and singular the said citizens and residents and taxpayers of said City and County and State.

* * * * * * *

V.

Defendant County and said defendant officers thereof are charged, as provided by law, with the assessment and receipt of returns of all property in said County and City for the purpose of collecting real and personal property taxes, and with the receipt of claims and affidavits for exemption from said taxation; and said defendants are charged, as provided by law, pursuant to said assessments and returns, with the collection of said taxes on all said property, except such taxes and on such property as are exempt therefrom

under and in accordance with valid tax exemption laws.

* * * * * * *

IX.

The defendants, and their agents, servants, officers and employees, unless enjoined and restrained by an order of this court, will under and by virtue of said amendment of 1951, fail to assess and tax, and fail to collect taxes, and will receive and approve claims for exemption, in respect of properties referred to herein, and thereby cast upon and force plaintiff and other taxpayers of said County and City and State to bear and pay the taxes so exempted; said taxes which will be thus borne by plaintiff and said taxpayers, other than those owning the exempted properties, will constitute a substantial and additional burden, as alleged above, and, as plaintiff is informed and believes and hence alleges, will amount in a sum total to many millions of dollars and thus will be added to the tax rolls of actual taxpayers, including plaintiff, and meanwhile the persons, corporations or organizations owning said properties thus immune from real or personal taxes, would receive the facilities for which taxes are necessarily levied, namely, fire, police, health and traffic, among others.

* * * * * * *

XI.

The said intention and acts of defendants to enforce and implement said amendment of 1951, by exempting thereunder said properties, will injure and take from plaintiff and the other taxpayers

> of said County and City and State their said property and property rights, and will cause him and them, material and irreparable loss.

The evidence adduced by plaintiff at the trial from the Roman Catholic priests and the County Assessors clearly demonstrated the truth of the foregoing allegations. The majority of the trial court therefore found these allegations to be true. See Paragraphs 1, 2, 4, 7 and 9 of the Findings of Fact set out in full at pages 20-42 of Appendix B, Statement as to Jurisdiction. The dissenting judge also concurred in these findings. See Paragraphs 1, 3, 4 and 5 of the Dissenting Findings of Fact quoted in full at pages 43-50 of Appendix C, Statement as to Jurisdiction.

Moreover, Intervenor-Appellee Roman Catholic Welfare Corporation itself concedes at page 9 of its brief that around $74,000 in taxes would be lost annually in Alameda County alone from the granting of the exemptions here involved. Recent reports of the California Board of Equalization of which the court can take judicial notice set forth that the assessed value of privately owned property in California exempt from taxation increased during the last year to a record total of over a *billion dollars*. Also, that the biggest relative gain occurred from exemptions under the law we attack as being unconstitutional.

While conceding that the parochial school exemptions would be granted and that this substantial amount of tax moneys would be lost, Intervenor nevertheless argues at page 10 of its supporting brief that there is no evidence that any increase of taxes

on non-exempt property would result in the ensuing year from the granting of the exemption. Apparently Intervenor believes that anticipated tax receipts from one group of taxpayers can be eliminated without passing on the burden to the remaining taxpayers. But common sense tells us this is not so. As the court observed in *Commonwealth v. Thomas,* 119 Ky. 208, 83 S. W. 572, 573:

> "It does not require profound reflection to reach the conclusion that whatever deficit there is in the fiscal budget due the state for any given year by reason of exemptions of property which would otherwise be required to contribute to the common weal is cast as an additional burden upon the other taxpayers . . ."

In any event, this is a suit to prevent a *threatened pecuniary* injury to tax moneys by reason of intended grants of invalid tax exemptions. The best answer to Intervenor can, therefore, be found in the California Supreme Court's own terse comment upholding the right of the plaintiff taxpayer to sue in this case. At the very beginning of its opinion, the California Supreme Court states:

> "Plaintiff, a citizen resident of defendant County and a taxpayer therein, brought this suit to challenge the legality of a tax exemption. Such actions are authorized by Section 526a of the Code of Civil Procedure (cf. Delaney v. Lowary, 25 Cal. 2d 561 and, being in aid of the collection of taxes, are distinguishable from cases in which a party seeking to avoid taxation was denied mandamus on the ground that an action for re-

fund of illegally collected taxes constituted an adequate remedy at law."

Section 526a, which the California Supreme Court refers to, reads in part as follows:

> "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein."

It is thus clear that there is a direct pecuniary injury to the plaintiff taxpayers, and that this suit can be maintained in under this foregoing California Statute.

II. APPELLANT HEISEY'S SHOWING OF HIS DIRECT PECUNIARY INJURY AS A MEMBER OF THE AFFECTED CLASS OF TAXPAYERS; OF HIS ORIGINAL STATUS AS A QUASI PARTY; AND OF THE COMPELLING NECESSITY FOR ALLOWING HIM TO CONTINUE THE PROCEEDINGS AS AN ACTUAL PARTY ON BEHALF OF ALL INJURED TAXPAYERS SIMILARLY SITUATED.

The California Supreme Court rendered its opinion in this case on June 6, 1956. Counsel for Plaintiff Alfred J. Lundberg immediately began preparing a Petition For Rehearing which was required to be filed by June 21st. On June 14, 1956, Alfred Lundberg died.

All taxpayers similarly situated were obviously then in danger of losing their rights asserted in the suit if the Petition For Rehearing were not presented and filed on June 21st and, if that petition were denied, if the matter were not carried to the United States Supreme Court. It must be recalled that out of the 4,804,533 votes cast on the 1952 referendum of this issue, 2,363,528 voters of California voted *against* the parochial school tax exemption statute. And in Alameda County, a *majority* of the votes cast were against approval of the statute. There was, therefore, a most substantial and numerous group and class of California taxpayers interested in seeing this case conclusively settled in favor of the plaintiff.

Appellant Paul W. Heisey pointed out in a verified petition filed with the California Supreme Court (See Appendix A), that it was necessary for him as an individual member of the injured class of taxpayers to be brought into this case as an additional plaintiff and appellant prior to June 21, 1956.

As was previously pointed out, this is a *class suit* to protect a *group* interest and right, namely, the interest of taxpayers to prevent a loss of municipal and county funds through the granting of invalid tax exemptions. In *Southside S. Ch. v. National F. S. Ch.*, 119 Cal. App. 11, 5 P. 2d 657 the court says:

> "The code section permits an informal type of pleading on behalf of an alleged *group* consisting of numerous named and unnamed persons, but *it is the right of the group as such rather than the rights of any named or unnamed individual*

> *or individuals upon which such complaint is based.*" (Emphasis ours)

For this reason, the courts have held that members of the affected group or class are *quasi* parties and may make themselves actual parties whenever it is necessary for the protection of their interests. In *Lindsay-Strathmore I. Dist. v. Superior Court,* 182 Cal. 315, 187 Pac. 1056, the court says:

> "Furthermore, all the persons thus represented are regarded as *quasi parties* and 'may intervene *and make themselves actual parties when necessary for the protection of their interests.*' (15 Ency. of Pl. & Pr. 634, 642) And they are bound by the decree." (Emphasis ours)

The necessity of bringing in an additional member of the class arose from the death of the original plaintiff. His executor declined to continue the suit on behalf of the class.

In *Phillips v. Brandt,* 231 Minn. 423; 43 N. W. 2d 285, the court was concerned with a taxpayer's action and the power to substitute another taxpayer to enable continuation of the litigation. At 43 N. W. 2d 289-291, the court said:

> "As stated, this suit was instituted by Phillips in a representative capacity in behalf of all taxpayers of the city. Larson and Anderson were taxpayers at that time. They were taxpayers thereafter throughout the trial and at the time of their motion, and would be bound by the ultimate judgment obtained in the action. Kaufer v. Ford, 100 Minn. 49, 110 N. W. 364; Ahlquist

> v. Commonwealth Elec. Co., 194 Minn. 598; 261 N. W. 452. Their status is defined in 39 Am. Jur., Parties §44, p. 919, relating to representative suits, as 'parties . . . in a sense before the court; . . . *quasi parties,* and . . . *parties in substance and legal effect.'*
>
> * * * * * * *
>
> *"We hold that it is within the discretion of the trial court to substitute a member of a class for whose benefit the action is brought as representative plaintiff following the death* or disqualification *of the original plaintiff.* Our conclusion in this respect finds ample support in the courts of other states." (Emphasis ours)

The statement of the Minnesota Supreme Court does find support in the authorities. For it is clear that a representative action brought on behalf of the members of a class does survive the death of the original plaintiff. *Spring v. Webb,* 227 Fed. 481; *Edwards v. Mercantile Trust Co.,* 121 Fed. 203; *Holmes v. Republic Steel,* 64 N. E. 2d 426 (Ohio); *Cf. Klopstock v. Superior Court,* 17 Cal. 2d 13; 108 P. 2d 906.

Thus in *Spring v. Webb,* 227 Fed. 481, the court specifically refused to dismiss an action when a representative plaintiff died. Instead, it held that either the personal representative of the original plaintiff or another member of the class might be substituted and permitted to continue the action on behalf of the group.

In this case, therefore, it remained for a member of the class—a quasi party—to seek formal entry into

the case as an actual party so a Petition For Rehearing could be filed before the decision of the California Supreme Court became final, and, if necessary, to carry the case on to the United States Supreme Court.

Appellant Heisey, as such a person, therefore presented a motion and affidavit to the trial court showing his status as an aggrieved taxpayer. Among other things, Heisey stated in his affidavit (see Appendix B):

> "That at all times since January 1, 1950, affiant has been and now is the owner of real and personal property located in the City of Oakland, County of Alameda, State of California, and a citizen and resident and taxpayer thereof; and assessed for and liable to pay taxes thereon and therein, as provided by law; that affiant at all said times has been and is aggrieved and situated similarly as plaintiff, and one of the class of taxpayers for whom the action above was prosecuted by plaintiff and desires that every legal step be taken and exhausted on appeal to prosecute said action for all purposes and to a final determination."

On the basis of this and other proof, the trial court ordered Heisey brought in as an additional plaintiff. (See Appendix C)

Appellant Heisey then applied to the California Supreme Court for permission to be brought in as an appellant. *Contrary to what Intervenor-appellee says, this was not an ex parte proceeding.* Heisey submitted a verified petition, and the California Supreme Court requested counsel for all parties to sub-

mit points and authorities on the necessity and propriety of bringing Mr. Heisey in as an appellant. *Intervenor submitted to the California Supreme Court authorities on this point, before that Court made an order.*

Contrary also to what Intervenor-appellee says, the record is not silent on Mr. Heisey's status as a taxpayer of the City of Oakland and County of Alameda or on his payment of such taxes. In his verified petition filed in the California Supreme Court (see Appendix A), Mr. Heisey stated, among other things:

> "At all times since January 1, 1950, petitioner has been and now is the owner of real and personal property located in the *City of Oakland, County of Alameda,* State of California, and is a *citizen and resident and taxpayer thereof;* and *assessed for and liable to pay taxes thereon and therein,* as provided by law; and *within one year before the commencement of this action paid a tax therein.*
>
> "As is shown on pages 51, and 87-88 of the Clerk's Transcript on this appeal, which are incorporated herein by reference, plaintiff Alfred J. Lundberg commenced and maintained this action on his own behalf as a citizen, resident and taxpayer of the said city, county and state, and also on behalf of all and singular the citizens and residents and taxpayers of said city and county and state.
>
> *"Petitioner at all times has been and is aggrieved and situated similarly as plaintiff and one of the class of taxpayers for whom the action above was prosecuted by plaintiff* and desires that

every legal step be taken and exhausted on appeal to prosecute said action for all purposes and to a final determination.

* * * * * * *

"That petitioner is a proper person to prosecute this action, said Petition for Rehearing, or further appeal on behalf of himself and said citizens and residents and taxpayers similarly situated; that out of a total of 4,804,533 votes cast in the 1952 referendum election in this case, 2,363,528 votes were cast against said referendum; that there is thus illustrated the wide public interest on the part of the citizens, residents, and taxpayers of this state in establishing the constitutional invalidity of the 1951 Amendment to Revenue and Taxation Code §214.

"That by reasons of the steps already taken and threatened to be taken by said executor named in the will of said Alfred J. Lundberg, there is grave danger that unless petitioner individually is brought into this appeal forthwith and authorized to join in said Petition for Rehearing, and any further appeal or petition for certiorari, such action, the rights of appeal, and the rights under said judgment in favor of Alfred J. Lundberg and the said citizens, resident taxpayers may be neglected, greatly damaged, or lost thereby." (Emphasis ours)

It is thus clear under the authorities and the facts that Mr. Heisey is an aggrieved taxpayer, a member of the class for whom this suit was instituted, and a proper person to carry on these proceedings. The California Supreme Court so ruled after a *contested* presentation by Mr. Heisey there! It stated:

"it is ordered that Paul W. Heisey, in his individual capacity be added as an additional plaintiff-respondent in the above entitled appeal."

III. THE PROOF THAT ROMAN CATHOLIC DOCTRINE IS INFUSED INTO AND PERMEATES THE ENTIRE CURRICULUM AND ATMOSPHERE IN THE SCHOOLS RECEIVING 88% OF THE TAX EXEMPTION SUBSIDY. MOREOVER, THE PAPAL DECREES AND CANONICAL LAWS URGE FOR THE ROMAN CATHOLIC SCHOOLS A MONOPOLY ON THIS EDUCATION.

At pages 11-12 and 29, its brief, Intervenor-appellee attempts to create the impression that Roman Catholic parochial schools are operated primarily for secular educational purposes and that only an incidental benefit to religion results from the existence of such schools. Intervenor also asserts that only twenty minutes per day are devoted to teaching Roman Catholic beliefs in parochial schools. This is not only *contrary to the evidence,* but also to the mandate of the Pontiffs in Rome.

In the well-known Encyclical Letter of December 31, 1929, on *Christian Education of Youth,* quoted in *Four Great Encyclicals,* Paulist Press, the following position was taken by Pope Pius XI:

> "For the mere fact that a school gives some religious instruction (often extremely stinted), does not bring it into accord with the rights of the Church and of the Christian family, or make it a fit place for Catholic students. To be this, it is necessary that *all the teaching* and the *whole organization* of the school, and its *teachers, syllabus* and *text books in every branch be regulated*

by the Christian Spirit under the direction and maternal supervision of the Church; so that religion may be in very truth the foundation and crown of the youth's entire training; and this *in every grade of school,* not only the elementary, but the intermediate and the higher institutions of learning as well. To use the words of Leo XIII, 'It is necessary not only that religious instruction be given to the young at certain fixed times, but also that *every other subject taught, be permeated* with Christian piety. If this is wanting, if this sacred atmosphere does not *pervade* and warm the hearts of masters and scholars alike, little good can be expected from any kind of learning, and considerable harm will often be the consequence." (Emphasis ours)

Similarly in Plaintiff's Exhibit 6 for Identification, Book Three of the Roman Catholic High School Religious Series, entitled "Living Our Faith", a book used in Roman Catholic parochial schools throughout California, it is said at page 237:

"In the words of Pope Pius XI: 'It is evident that both by right and in fact the mission to educate . . . belongs to the Church.' This means in practice that students must attend Catholic schools. It is not by any means sufficient that they receive brief instruction outside of school hours. We can only learn, know, and live our religion if we *absorb it constantly from our surroundings.*

"In the ideal educational atmosphere religion is *infused into the whole process of learning.* Students should be *constantly* aware of the unbreakable connection of the world with eternity. Teachers should be Catholics and, whenever pos-

sible, religious. *Textbooks in every branch of knowledge* and on *every level of education* from the first grade to the end of university training, *should be Catholic* publications when they are available." (Emphasis ours)

See also V, *The Catholic Encyclopedia* (1925), p. 304, XIII, *The Catholic Encyclopedia* 555.

IV. INTERVENOR'S ERRONEOUS ASSERTION THAT ROMAN CATHOLIC UNDERGRADUATE SCHOOLS SAVE THE STATE MONEY.

At pages 10-11, Intervenor asserts that Roman Catholic schools save the state money by educating Catholic children without cost to the state.

First—Intervenor's attempt to submit "proof" of this point was rejected in the trial court. There is no such evidence in this case. And as the prevailing party below, Intervenor can hardly claim the benefit of evidence it offered when the trial court refused to admit such evidence and the appellate court refused to reverse on this point.

Second—Roman Catholic children attend Roman Catholic schools because they are *compelled* to. *They have no choice* between Catholic schools and public schools. *They are forbidden to attend public schools,* and in some cases may be excommunicated for doing so. Thus, in "Encyclical Letter, Pius XI, December 31, 1929, on Christian Education of Youth," *Four*

Great Encyclicals (Paulist Press), page 63, Pope Pius XI is quoted as follows:

> "From this it follows that the so-called 'neutral' or 'lay' school, from which religion is excluded, is *contrary to the fundamental principles of education.* Such a school moreover *cannot exist in practice;* it is bound to become irreligious. There is no need to repeat what our Predecessors have declared on this point, especially Pius IX and Leo XIII, at times when laicism was beginning in a special manner to infest the public school.
>
> "We renew and confirm their declarations as well as the Sacred Canons in which the frequenting of non-Catholic schools, whether neutral or mixed, those namely which are open to Catholics and non-Catholics alike, *is forbidden for Catholic children,* and can be at most tolerated, on the approval of the Ordinary alone, under determined circumstances of place and time, and with special precautions." (Emphasis ours)

Through Plaintiff's Exhibit 6 for Identification, Roman Catholic high school children are taught as follows:

> "The Church is opposed to attendance at non-Catholic schools, for she recognizes the real danger to our faith." (page 55)
>
> "Canon Law states: *'Catholic children shall not attend non-Catholic, neutral, or mixed schools,* namely, those which are open also to non-Catholics' (Canon 1374). Therefore, by right and *by Church law parents are required to register their*

children in Catholic schools." (Page 238) (Emphasis ours)

Ramstein, *A Manual of Canon Law* (1947) states at page 710:

> "In some dioceses local law may make it an offense punishable with *ipso facto* communication to send children to a public school without previous approval of the bishop or his delegate, e.g. the pastor."

See also *Everson v. Board of Education,* 330 U.S. 1, 22; XIV *The Catholic Encyclopedia,* p. 253; Bouscaren and Ellis, *Canon Law* (1951), pp. 761-767; II Woywood, *A Practical Commentary on the Code of Canon Law* (1925), pp. 117-120.

Contrast with these proscriptive mandates the declared objective of our various states in establishing, promoting, and maintaining public schools as such. The viewpoint of the People of California is well expressed as follows in Section 15 of Article XVI of the California Constitution:

> ". . . that it is in the interests of the State and of the people thereof for the State to aid school districts of the State in providing necessary and adequate school sites and buildings for the pupils of the Public School System, such system being a matter of general concern inasmuch as the *education of the children of the State is an obligation and function of the State."* (Emphasis added)

In every state of the Union today, the state-supported public school is recognized as the one sure

means of promoting American ideals and perpetuating the democratic way of life. For the public school is free, equal, open to all; free from divisive influence; and dedicated exclusively to the service of *all* our people. In *Brown v. Board of Education,* 347 U. S. 483, 493 this court states in a unanimous opinion:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."

As the four concurring Justices stated in *McCollum v. Board of Education,* 333 U.S. 203, 231:

> "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."

As Justice Schauer says at 289 P. 2d 438, 444:

> "It is elementary that the conduct of a *public school is a public service* while the operation of a *private school is a private business.*" (Emphasis ours)

The public service performed by the public school is unrelated to the activities of a Roman Catholic parochial school. From the evidence adduced in this case we observe that Roman schools teach that separation of church and state is an evil principle, that public schools are contrary to the fundamental principles of education, that all non-Catholic religions are

counterfeit, that charities such as the Y.M.C.A. and Salvation Army are false religions, that association with non-Catholics is a pitfall that endangers "Faith", that all non-Catholic religious books are forbidden reading, and that a witness may withhold the truth in an American court of justice. We observe that these divisive and undemocratic beliefs are infused into and permeate the whole Catholic educational curriculum and school life. And we say that schools teaching such matters and permeating the educational process with such ideas are not saving the American taxpayers a cent.

The public school is free to all. It provides equal facilities for all. It is open to children of all faiths, colors and creeds. It is free from all sectarian and *divisive* influence. And it strives primarily to bring about a healthy democracy by educating its people to think for themselves, to reject racial and religious intolerance, to work together, to associate freely with each other, and to cherish our *democratic* ideals.

These objectives are the opposite of those of the Roman Church if we may believe the declarations of its pontiff and the teachings found in its school textbooks.

There is therefore a hostile and competitive educational endeavor of the Roman Church to promote its schools to the detriment of the public schools. This saves the public nothing because the public cannot and would not support such indoctrination. *And it saves the public nothing because the Catholic children who*

follow the line cannot and would not attend a public school if one were available.

The simple answer to Intervenor is that Roman Catholic children are required to attend Roman Catholic schools because only there can the children be taught the matters forbidden in public schools and only there can Roman Catholic doctrine "permeate" the educational process. This *private* religious program cannot be equated with public economy.

V. INTERVENOR'S ERRONEOUS ASSUMPTION THAT ROMAN CATHOLIC SCHOOLS PERFORM A PUBLIC SERVICE BECAUSE THEY MUST MEET CERTAIN MINIMUM STATUTORY EDUCATIONAL REQUIREMENTS.

Intervenor's counsel confuses compliance with the law with performance of a public service.

Roman Catholic children are forbidden by Roman Catholic law to attend public schools. The United States Supreme Court has upheld their right so to do as an exercise of freedom of religion. In California certain minimum educational requirements are imposed upon all private schools. Thus they must be full time, have capable teachers, teach in the English language, and offer instruction in the same *branches* of study required to be taught in the public schools of the state.

These minimum requirements obviously do not prevent, nor were they intended to prevent, Roman Catholic schools from injecting and infusing Roman Catholic doctrine into every branch of study that is taught.

And the declarations of the Roman Pontiff and the contents of the textbooks offered in this case prove conclusively that that is done and must be done.

Thus to comply with the law is not to meet the secular educational *objectives* of the public school system. The state does not endorse religious schools. It does not promote them. It cannot support them. And it is forbidden to teach the things in its public schools that are taught in such private schools. The only thing it can do is to insist that certain *minimum* standards be met. This does not mean that the competitive private schools are performing a public service.

Such schools are merely exercising a constitutional right when they indoctrinate sectarian dogma. They are merely complying with the law when they meet full time, teach in the English language, and teach *in their own way* the same branches of study that are taught in the public school. But the state certainly cannot be said to subscribe to the teachings in such private schools or to recognize that such private schools are meeting a public need merely because it insists that certain laws be complied with for the protection of the children in such private schools.

REPLY TO INTERVENOR APPELLEE'S ARGUMENT.

I. APPELLANT HEISEY HAS SHOWN CLEARLY THAT HE AND HIS CLASS ARE IN IMMEDIATE DANGER OF SUSTAINING A DIRECT FINANCIAL INJURY AS TAXPAYERS, AND HE THUS CLEARLY PRESENTS A JUSTICIABLE CONTROVERSY WITHIN THE JURISDICTION OF THE UNITED STATES SUPREME COURT.

It is a universal rule—accepted by the United States Supreme Court—that city or county taxpayers may maintain suits in equity to restrain unlawful governmental action which directly or indirectly leads to taxation and thus increases the burden of taxation.

52 *Am. Jur.,* Taxpayer's Actions §3, p. 3;
16 *CJS,* Constitutional Law, §80, p. 247;
Crampton v. Zabriskie, 101 U. S. 601;
Massachusetts v. Mellon, 262 U.S. 447.

This rule has frequently been applied to uphold suits by taxpayers to enjoin the granting of an unlawful tax exemption.

16 *CJS,* Constitutional Law, §80, p. 248;
Mott v. Pennsylvania R.R., 30 Pa. 9, 72 Am. Dec. 664;
Williams v. Baldridge, 48 Idaho 618, 284 Pac. 203;
Keith v. State Funding Board, 127 Tenn. 441, 155 S.W. 142;
cf. Graham v. Jones, 198 La. 507, 3 So. 2d 761, 769.

In the case of an unlawful grant of tax exemption, the direct pecuniary injury to taxpayers is apparent. As the Court states in *Mott v. Pennsylvania R.R., supra,* 72 Am. Dec. 669:

"The taxpayers, whose burdens will be necessarily increased by releasing from taxation any portion of property liable to contribute to the payment of the public debt and the expenses of government, have also an interest in the question, and, of course, have a right to be heard."

See also *Lawrence v. State Tax Commission,* 286 U.S. 276, where a taxpayer challenged certain exemptions under the Mississippi income tax laws and was permitted to appeal from an adverse decision of the Supreme Court of Mississippi. The United States Supreme Court said at 286 U.S. 282:

"Upon one of the alternative assumptions made by the court, that the amendment is discriminatory, appellant's constitutional rights were infringed when the tax was levied upon him, and state officers acting under the amendment refrained from assessing the like tax upon his corporate competitors. See Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239, 246, ante, 265, 272, 52 S. Ct. 133. If the Constitution exacts a uniform application of this tax on appellant and his competitors, his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it, see Greene v. Louisville & Interurban R. Co., 244 U.S. 499, 508, 512 et seq., 61 L. Ed. 1280, 1285, 1287, 37 S. Ct. 673, Ann. Cas. 1917E, 88; Smith v. Cahoon, 283 U.S. 553, 564, 75 L. Ed. 1264, 1272, 51 S. Ct. 582, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked. The burden does not rest on him to test again the validity of the amendment by some pro-

cedure to compel his competitors to pay the tax under the earlier statute. Iowa-Des Moines Nat. Bank v. Bennett, supra (284 U.S. p. 247, ante, 273, 52 S. Ct. 133). See Cumberland Coal Co. v. Board of Revision, 284 U.S. 23, ante, 146, 52 S. Ct. 48. We therefore conclude that the purported non-federal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory, and that the appellant may invoke the jurisdiction of this Court to decide the question."

The Intervenor relies on *Doremus v. Board of Education,* 342 U. S. 429, in an attempt to show that appellant's standing as a taxpayer does not bring him within the "case" or "controversy" requirement. But the *Doremus* case did not involve a *pecuniarily aggrieved* taxpayer as this case does. In the *Doremus* case, the plaintiff showed he was a taxpayer, but did not show that taxpayers would be injured. As this Court pointed out at 342 U. S. 429, 431:

"One of the plaintiffs is a 'citizen and taxpayer;' the only interest he asserts is just that and in those words, set forth in the complaint and not followed by specification or proof. It is conceded that he is a citizen and a taxpayer, *but it is not charged* and it is neither conceded nor proved *that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work.* (Emphasis added)

* * * * * * *

"The complaint is similarly niggardly of facts to support a *taxpayer's grievance.* Doremus is al-

leged to be a citizen and taxpayer of the State of New Jersey and of the Township of Rutherford, but any relation of that Township to the litigation is not disclosed to one not familiar with local geography. Klein is set out as a citizen and taxpayer of the Borough of Hawthorne in the State of New Jersey, and it is alleged that Hawthorne has a high school supported by public funds. In this school the Bible is read, according to statute. There is *no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school.* No information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading *increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it.*" (Emphasis added)

Our case is not like the *Doremus* case. Our case involves the same showing of monetary injury to taxpayers that was involved in *Everson v. Board of Education,* 330 U.S. 1. Plaintiffs Heisey and Lundberg both showed that they were taxpayers of the City of Oakland and County of Alameda; that they were assessed for, liable to pay, and had paid real property taxes to said City and County; that said City and County officials were about to grant an allegedly illegal property tax exemption; that said officials would fail to collect taxes from the exempt properties and *thereby cast* upon and force plaintiffs to bear the taxes so exempted; that a substantial sum would thereby be added to the tax rolls of actual taxpayers; and

that plaintiffs *and said other taxpayers* would thereby have their property and property rights taken from them.

A threatened pecuniary injury to local taxpayers was alleged and proved. It was shown that a substantial amount of tax money would either be lost to the County Treasury or assumed by the remaining non-exempt taxpayers if the threatened exemptions were not enjoined.

This is a dollars and cents injury.

Such an injury is the fundamental requirement of taxpayer suits allowed in California under Code of Civil Procedure Section 526a. Such a dollars and cents, measurable injury was found by *all three* trial judges and confirmed by the California Supreme Court.

Our case, therefore, clearly falls within the threatened pecuniary injury test discussed in the *Doremus* case and ignored in Intervenor's Brief. The Supreme Court said in the *Doremus* case at 342 U.S. 429, 433-434:

> "It is true that this Court found a justiciable controversy in Everson v. Board of Education, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504, 168 A.L.R. 1392. But Everson showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not."
>
> * * * * * * *
>
> *"The taxpayer's action can meet this test* but only when it is a good-faith pocketbook action.

> It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. *If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary.* It is not a question of motivation but of possession of the requisite *financial interest* that is, or is *threatened to be injured* by the unconstitutional conduct."

The case of *Williams v. Riley,* 280 U.S. 78, cited by Intervenor, is not in point because it did not involve a suit by a *county* taxpayer against *county* officials to restrain a threatened loss of *county* funds. And the jurisdiction of this court to entertain such *county* taxpayer appeals as ours is well established. *Crampton v. Zabriskie,* 101 U.S. 601; *Massachusetts v. Mellon,* 262 U.S. 447; *Everson v. Board of Education,* 330 U.S. 1.

Intervenor wrongly states that there is no evidence in the record to show Heisey is or ever was a resident and taxpayer of the defendant city and county. But see his verified petition presented to California Supreme Court, included in the record of this case, and reproduced in Appendix A of this brief. See also Appendix B.

At page 21 of its brief, Intervenor cites three cases to show that a state may grant tax exemptions without violating the Federal Constitution. This may be true. But it is equally true (1) that the state may not

aid religious schools by granting tax exemption subsidies, (2) that it may not make an unreasonable classification or unreasonably discriminate in granting such exemptions, and (3) that it may not grant exemptions for a non-public purpose. These are three *constitutional* limitations on the power to exempt. This is clear from the cases we cite in the following portions of this brief. Intervenor's authorities do not refute these principles which control in our case.

Intervenor next contends that a taxpayer does not suffer a direct pecuniary injury through the granting of an unlawful tax exemption. But if this were so, there could have been no taxpayer suit under California Code of Civil Procedure Section 526a in this case. The clear, direct, measurable pecuniary injury to taxpayers in this case is *certain* to result in one of two ways: Either the amount which Intervenor concedes will be lost must be collected from the remaining taxpayers; *or,* it will truly be *lost* to the County Treasury each year. In either case, there is a direct, added financial burden on taxpayers. But in any event the trial court in this case found from all the evidence "that this burden would thus be added to the tax rolls of actual taxpayers, including plaintiff . . ." See Paragraph 7 of the Findings of Fact at page 26 of Appendix B of the Statement as to Jurisdiction.

The direct pecuniary loss here is best summarized by the language of two New Hampshire cases. In *Eyers Woolen Co. v. Town of Gilsum.* the New Hampshire Supreme Court says at 84 N.H. 1, 146 Atl. 511, 515:

> "The net result of the transaction is to compel the other taxpayers of the town to contribute the plaintiff's (the exempt taxpayers') taxes. It gives the town's money to the plaintiff as effectually as would a direct appropriation of the sum involved.
>
> * * * * * * *
>
> "Such non-payment is, in effect, a compulsory payment of money by those who bear their shares of the common burden, to the privileged person who does not bear his share."

Similarly, in *Canaan v. District,* 74 N. H. 517, 537, 70 Atl. 250, 257, Chief Justice Parsons states:

> "It is undoubtedly true that all exemptions from taxation are practically equivalent to a direct appropriation. Such is the effect of the exemption of . . . seminaries of learning."

II. APPELLANT'S SHOWING THAT THE CHALLENGED STATUTE GRANTS TAX EXEMPTION SUBSIDIES TO, FORCES PUBLIC TAX SUPPORT FOR, AND USES THE FORCE OF THE TAX SYSTEM TO PROMOTE NON-PUBLIC, UNDERCOLLEGIATE, SECTARIAN SCHOOLS CLEARLY PRESENTS A SUBSTANTIAL FEDERAL QUESTION UNDER THE EVERSON AND McCOLLUM DECISIONS.

Intervenor does not attempt to deny the clear mandate of the *Everson* and *McCollum* decisions that:

> A state cannot pass laws which aid one religion, aid all religions, or prefer one religion over another.

Neither does Intervenor deny the equally clear declaration in *Zorach v. Clauson,* 343 U. S. 306, 314-315 that:

> "Government may not finance religious groups . . . nor use secular institutions to force one or some religion on any person."

The simple constitutional question here is whether the State of California has granted substantial financial assistance to religious schools at the expense of those Americans who do not subscribe to what is taught in such schools. In any event, if the force of the tax system was used to promote such schools, then the First Amendment prohibition has been violated.

The evidence in this case demonstrates, and the trial court found, that religious schools in the State of California will be relieved of at least one million dollars in taxes each year by reason of the 1951 tax exemption subsidy statute. In Alameda County alone —if we accept Intervenor's own conceded figure— these schools as of the time of trial would be relieved of $74,000 in taxes. Since then the official reports indicate a record increase.

This is financial aid! It is substantial, financial aid! It constitutes the use of the force of the tax system to give that aid! And the aid is at the direct pecuniary expense of non-exempt taxpayers who may disbelieve the divisive dogma taught in such schools.

The obnoxious burden thus imposed upon non-exempt taxpayers is best summarized in the statements already quoted from the New Hampshire Supreme Court decisions:

> "The net result of the transaction is to compel the other taxpayers of the town to contribute the plaintiff's (the exempt taxpayers') taxes. It

gives the town's money to the plaintiff as effectually as would a direct appropriation of the sum involved.

* * * * * * *

"Such non-payment is, in effect, a compulsory payment of money by those who bear their shares of the common burden, to the privileged person who does not bear his share." *Eyers Woolen Co. v. Town of Gilsum,* 146 Atl. 511, 515.

"It is undoubtedly true that all exemptions from taxation are practically equivalent to a direct appropriation." *Canaan v. District,* 74 N. H. 517, 537, 70 Atl. 250, 257.

All that we are required to do at this point is to show that a "substantial" Federal question is presented for review by this Court. We believe that the decision in the *McCollum* case, the proved pecuniary injury in this case, and the obvious aid and benefit to religious schools, demonstrate the substantiality of the question. Our conclusion is confirmed by almost every legal writer who has written on the scope of the First Amendment since the *Everson* and *McCollum* decisions. Thus in 49 Columbia Law Review, 968, there is an entire note on the subject of tax exemption subsidies granted to religion; and the writer concludes that such tax exemptions clearly violate the First Amendment in light of the *Everson* and *McCollum* decisions. The same conclusion is reached by Paulsen in an exhaustive treatment of the problem in 14 Law and Contemporary Problems 144. Pfeffer also reaches this conclusion in his timely book entitled "Church, State and Freedom," pages 183-190 (1953).

And see the other law review articles referred to at pages 22-23 of Appellant's Statement as to Jurisdiction.

Intervenor has not produced a single case to refute appellant's contention that tax exemptions for parochial schools in California constitute an annual subsidy of over one million dollars, go almost exclusively for the support and benefit of Roman Catholic schools, and thus go to foster and promote schools which are "permeated" with a doctrine that teaches hostility to the principle of separation of church and state, hostility to the public schools, and hostility toward non-Catholics.

This is an obnoxious financial burden which clearly falls within the prohibition of the First Amendment and comes within the declaration of Thomas Jefferson that:

> "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

The majority opinion of four justices of the California Supreme Court "answers" this contention by asserting that the oppressive burden of tax exemptions for parochial schools is justified by the fact that it existed in colonial times and continues in most states today. Intervenor places a similar reliance upon "history" (see Supporting Brief pages 30-36). But such arguments rely upon an invalid premise. For establishments of religion were themselves in vogue on the state level when and after the Federal Con-

stitution was adopted. In an excellent and carefully documented review of the situation in the states at the time of the adoption of the Federal Constitution, Pfeffer summarizes the facts as follows:

> Two out of thirteen, Virginia and Rhode Island, conceded full freedom [of religion];
>
> One, New York, gave full freedom except for requiring naturalized citizens to abjure foreign allegiance and subjection in all matters ecclesiastical as well as civil;
>
> Six, New Hampshire, Connecticut, New Jersey, Georgia, North and South Carolina ADHERED TO RELIGIOUS ESTABLISHMENTS;
>
> Two, Delaware and Maryland, demanded Christianity;
>
> Four, Pennsylvania, Delaware, North and South Carolina, required assent to the divine inspiration of the Bible;
>
> Two, Pennsylvania and South Carolina, imposed a belief in heaven and hell;
>
> Three, New York, Delaware, and South Carolina, excluded ministers from civil office;
>
> Four, Maryland, Virginia, North Carolina, and Georgia, excluded ministers from the legislature;
>
> Two, Pennsylvania and South Carolina, emphasized belief in one eternal God;
>
> One, Delaware, required assent to the doctrine of the Trinity;
>
> Five, New Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina, insisted on Protestantism;
>
> One, South Carolina, still referred to religious "toleration".

See Pfeffer, *Church, State and Freedom,* pp. 102-106 (1953).

It is therefore obvious that if one were to rely upon the "history" of church-state establishments at the time of the adoption of the Federal Constitution, a complete *union* of church and state could be justified today upon the basis of the situation in 1789 in at least six states. But the Supreme Court in the *Everson* and *McCollum* cases did not rely upon history in this manner. Instead, it pointed to the abuses of church-state union which had drawn colonists to the Americas and led to the abuses in the colonies. These abuses in turn led to insistence upon an "establishment of religion" clause at the *Federal* level in 1789. Finally, they led to the awakening of religious freedom on the *state* level after 1789, then to the rise of the public school system, and then to the application of the Federal principle to the states by reason of the adoption of the Fourteenth Amendment. Here, then, was the real application of history—an appreciation of the abuses which led to the adoption of the First Amendment and which justified the application of First Amendment principles to the states *in later years* through the Fourteenth Amendment. It was this sort of judicial application of historical *lessons* that formed a basis for that other great Fourteenth Amendment decision in *Brown v. Board of Education,* 347 U.S. 483.

From a historical standpoint, therefore, it is of course true that tax exemptions for church schools existed in the colonies and at the time of the adoption

of the Federal Constitution. It is just as true that there was pervasive church-state unity in the states at the time of the adoption of the Federal Constitution. And the reason for granting exemptions at that time was the fact that church schools *were* the state schools.

Today, *non-sectarian* schools are the only legitimate state schools. Today, church-state unity is forbidden. Today church schools do not constitute state schools. And today the oppressive practice of compelling taxpayers to grant church-school subsidies through tax exemptions should be struck down as state aid to religion just as surely as was the oppressive state aid in the *McCollum* case.

III. APPELLANT'S SHOWING THAT THE CHURCH-SCHOOL EXEMPTION STATUTE FORCES APPELLANT AND OTHER TAXPAYERS WHO ARE PROSCRIBED FROM SECTARIAN INDOCTRINATION IN THE PUBLIC SCHOOLS TO SUPPORT NON-PUBLIC SCHOOLS WHICH INSTRUCT ON THESE FORBIDDEN SECTARIAN MATTERS CLEARLY PRESENTS A SUBSTANTIAL QUESTION WITHIN THE PROHIBITION OF THE EQUAL PROTECTION CLAUSE.

In *Hillsborough Township v. Cromwell,* 326 U. S. 620, 66 S. Ct. 445, 90 L. Ed. 358, 363, the United States Supreme Court states:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class."

See also *Wheeling Steel Corp. v. Glander,* 337 U. S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544. Also in the *Carmichael* case, 301 U. S. 495, which Intervenor cites so frequently, it is apparent from the exhaustive discussion of the Supreme Court that the state may not make an unreasonable classification for exemption purposes and that exemptions will be declared invalid where there is an unreasonable discrimination against people in the same class.

On the question of state support for sectarian indoctrination in our primary and secondary schools, appellant and The Roman Catholic Welfare Corporation of San Francisco are in the same class. Appellant Heisey has a legitimate interest in seeing his particular religious beliefs indoctrinated in the public school system he is compelled to support. If he were an atheist, he would have a legitimate interest in seeing atheistic doctrines taught in such schools. Yet the California Constitution and the United States Constitution both prevent him from having this done. Under both constitutions, it is clear that no sectarian or denominational doctrine may be taught or permitted, directly or indirectly, in any of the state supported public schools of California, Section 8, Article IX *California Constitution; Illinois ex rel, McCollum v. Board of Education,* 333 U. S. 203. Yet under the challenged California exemption subsidy statute, appellant and other taxpayers similarly situated are forced to give tax support to private, competitive, undercollegiate sectarian schools whose avowed purpose

is the permeation of the entire educational atmosphere with Roman Catholic doctrines.

This state action which proscribes appellant from having his religious beliefs indoctrinated in state supported public schools on the one hand and yet uses state support for and compels plaintiff to give support to private schools that indoctrinate religious doctrines which he disbelieves on the other is a clear and unreasonable discrimination against plaintiff and other taxpayers similarly situated.

It is plain under the important decision in *Brown v. Board of Education,* 347 U. S. 483, that if state support is to be given to education, it must be given on an equal basis. Thus the state cannot support one set of schools which do not draw the line as to color and yet support another set of schools, whether public or private, which do discriminate on the basis of color. And certainly it is an obvious conclusion to be drawn from the *Brown* decision that the state likewise cannot support one set of public schools where sectarianism is forbidden and yet support another set of schools, whether public or private, where sectarianism is "infused into" and "permeates" the entire educational atmosphere. In either case—whether the state supports a dual set of schools, one set discriminating along racial lines, or a dual set of schools one set discriminating along religious lines—there is an unreasonable classification and an arbitrary discrimination. This is therefore the question that appellant presents under the equal protection clause of the Fourteenth Amendment.

Intervenor has presented no argument in answer to appellant's contention that all persons are equally entitled to have our *state-supported* educational processes free, equal, non-sectarian, and available to all. The Roman Catholic schools which received 88% of the California tax exemption subsidy benefit are not free, are avowedly sectarian, and are not available to all. *By reason of the fact that there is state support, through the tax exemption subsidy statute,* there is an unreasonable discrimination against plaintiff and those who are forced to pay the bill. On the other hand, if these Roman Catholic schools would pay their own way and pursue their own activities at their private expense, there could be no equal protection question. The controversy here arises because private schools seek public money while pursuing unequal and discriminatory practices forbidden to the public in the other schools—the public schools—which are state supported. The state support itself violates the First Amendment, but the illegality is compounded by reason of the arbitrary discrimination also involved.

We cannot believe that the United States Supreme Court could rule in the *Brown* case that there shall be no discrimination in the public schools and yet pave the way for *state-supported* discrimination in private schools either on the basis of race or religion. Therein lies the direct applicability of the *Brown* case to ours.

IV. APPELLANT'S SHOWING THAT THE OVERWHELMING PREPONDERANCE OF TAX EXEMPTION SUBSIDY HERE GOES TO PRIVATE SCHOOLS WHOSE WHOLE EDUCATIONAL ATMOSPHERE IS PERMEATED WITH SECTARIAN DOGMA CLEARLY PRESENTS A CASE OF TAX EXEMPTION FOR A NON-PUBLIC PURPOSE WITHIN THE PROHIBITION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Tax exemptions for non-public purposes are forbidden under the constitutions of most states and under the United States Constitution. Intervenor apparently concedes this point.

For example, in *State v. Armory Board,* 174 Kan. 369, 256 P. 2d 143, 152, the Kansas Supreme Court states:

> "In order, however, for the legislature to extend exemptions beyond those expressly designated in the Constitution, they must have a *public purpose* and be designed to promote the *public* welfare." (Emphasis ours)

Similarly, *In Re Opinion of the Justices,* 88 N. H. 484, 190 Atl. 425, 429, the New Hampshire Supreme Court states:

> "As a corollary to the prohibition against taxation to aid a private purpose, legislation resulting in or leading to taxation therefor is also invalid. *The legislature may not exercise* or delegate *its taxing power for private benefit through the indirect expedient of an exemption.*" (Emphasis ours)

The point we make here, of course, is that the Roman Catholic parochial schools, which receive 88 per cent of the benefit of the challenged tax exemption

statute, are not organized and do not exist to perform a public service. Instead, they are for private uses and purposes. Intervenor counters with the argument that such private sectarian schools are authorized by law and comply with the law in the matter of their curriculum. Once again we say that Intervenor confuses compliance with the law with performance of a public service.

The unique contribution of this case to an understanding of the problem of state support for undergraduate religious schools is the evidence plaintiff adduced of the subjects actually taught in the undergraduate Roman schools receiving 88% of the subsidy benefit. Plaintiff sought to do even more. He offered textbooks in use in such schools to show the divisive nature of the sectarian dogma indoctrinated therein. See Appendix E of the Statement as to Jurisdiction for representative quotations from the textbook, "Living Our Faith", in use throughout Roman Catholic parochial schools of California.

Plaintiff also produced the recent declarations in Roman Catholic encyclopedias and by the Roman Popes that each and every subject taught in Roman Catholic schools must be *permeated* with sectarianism and that Roman Catholic beliefs are to be *"infused into the whole process of learning"*.

It is precisely because the Roman Catholic educational atmosphere *is* permeated in whole or in part with divisive sectarianism that state support to Roman Catholic educational institutions cannot possibly serve a public purpose. One might contend, as

Intervenor does, that state aid to Roman Catholic parochial schools constitutes aid to *secular* education and that the aid to religion is only incidental. But the claim falls instantly in the face of the *evidence* in this case. For secular education—the sort the public can constitutionally support—is unknown in the Roman Catholic parochial schools. That is why Roman Catholic children are prohibited from attending public schools. It is why Pius XI declares that the "neutral" public school "from which religion is excluded, is contrary to the fundamental principles of education".

We say that no public purpose can ever be served by schools which teach and infuse into the whole or partial process of learning the belief that separation of church and state is an evil compromise (Appendix, St. Jur., p. 53); that non-Catholic methods of worshipping God are counterfeit (Appendix, St. Jur., p. 53); that the Salvation Army and the Young Men's Christian Association are false religions (Appendix, St. Jur., pp. 54-55); that Catholics may not cooperate with or associate with Knights of Pythias, Odd Fellows, Sons of Temperance, or Masons (Appendix, St. Jur., pp. 55-56); that public schools are contrary to the fundamental principles of education (Appendix, St. Jur., pp. 56-57); that any books contrary to Catholic beliefs are forbidden (Appendix, St. Jur., pp. 57-58); and that a witness may withhold the truth in an American court of justice (Appendix, St. Jur., p. 58).

One need not be opposed to Catholicism or hostile to religion to contend that the teaching of such doc-

trines is private business and serves no public purpose. In America we are dedicated to the proposition that sectarian beliefs *are* matters of private concern and matters for private support only. Plaintiff, therefore, presents a substantial federal question when he shows that matters obviously private are infused into and in fact permeate the *process of learning* in the schools receiving the state support in this case. The schools admittedly must comply with the law in the matter of their general curriculum; and students who attend these schools do so as a matter of constitutional right. But a tax exemption subsidy for such schools is a tax exemption for a non-public purpose and is clearly within the prohibition of the due process clause of the Fourteenth Amendment.

Intervenor attempts to answer this argument by pointing to the statements in *Cochran v. Board of Education,* 281 U. S. 370, and *Everson v. Board of Education,* 330 U. S. 1. It is true that a five-judge majority of this court rejected a "public purpose" argument in the *Everson* case. But it is also true, however, as Mr. Justice Jackson commented, that the record in the *Everson* case was completely devoid of proof as to what was taught in Roman Catholic parochial schools.

We have said repeatedly that plaintiff in our case presented no such scanty record. Thus plaintiff directed attention to the Roman Catholic Encyclopedias and to the admissions of the Roman Popes that Catholicism permeates and is infused into the *whole process of learning.* Plaintiff also showed the hostile

and divisive nature of the dogma thus infused into the educational atmosphere.

These are new points. They present new and compelling proof that parochial schools serve a private purpose and that their teaching is private business. Appellant therefore believes that a substantial question is presented on the "public purpose" point by reason of these new and compelling features not presented or available to this court in the *Everson* case.

V. APPELLANT ALSO HAS PRESENTED OTHER AND SUBSTANTIAL FEDERAL QUESTIONS ARISING UNDER THE DUE PROCESS CLAUSE. THE SUBSTANTIALITY IS DEMONSTRATED BY THE THREE-JUDGE DISSENTING OPINION OF THE CALIFORNIA SUPREME COURT WHICH POINTS OUT THAT THE FOUR-JUDGE MAJORITY SIMPLY IGNORED AND REFUSED TO APPLY THE PLAIN LANGUAGE OF THE CALIFORNIA CONSTITUTION WHICH PROHIBITS TAX EXEMPTION SUBSIDIES FOR PAROCHIAL SCHOOLS.

A. The California Constitution clearly prohibits tax exemptions for, grants to, or aid of sectarian schools. The plain language of Article XIII, Section 1c of the California Constitution, plus the undisputed evidence in this case, all demonstrate that the 1951 Legislature had no power to "deem" schools to be within the Constitution. The dissenting opinion of the split decision therefore makes it clear that the majority of the California Supreme Court has deprived appellant of due process of law by refusing to follow the clear mandates of the California Constitution.

We shall not repeat the evidence nor arguments set forth in our Statement as to Jurisdiction. Intervenor has haughtily chosen to disregard the entire question. But we should point out that the California Constitution clearly prohibits any property tax exemptions

not *specifically* granted by the Constitution. *California Constitution,* Article XIII, Section 1. It also clearly prohibits any grants to or in aid of sectarian schools. *California Constitution,* Article IV, Section 30. And there is not a word in the California Constitution which pertains to undercollegiate private or parochial schools, although there are many sections dealing with other types of schools and educational purposes. The evidence of pertinent legislative history in this case, plus the clear assurance given to the California voters in 1944 when they adopted the Welfare Exemption that:

> ". . . schools other than colleges *will not be exempted* under this amendment because the Legislature expressly eliminated the term 'educational'."

should have *compelled* any court which was following the Constitution to deny the attempted exemption of parochial schools by the Legislature in 1951. The California Legislature has no power to "deem" what shall be in the California Constitution.

The clear deprivation of ordinary due process of law here is demonstrated by the unusually frank opinion of the three-judge minority of the California Supreme Court. The following excerpts from Justice Schauer's Dissenting Opinion, concurred in by Justices Shenk and Carter, should demonstrate the fundamental due process issue:

> "Since 1914 the provisions of section 1a of Article XIII of the California Constitution have exempted from taxation the property of a non-

profit '*educational institution of collegiate grade,* . . . used exclusively for the purposes of education.' (Italics added.) The quoted language is specific; *it leaves no room for speculation or 'construction.'* The majority opinion holds that the language of section 1c of the same Article of the Constitution, adopted in 1944, which authorizes the Legislature to exempt from taxation property 'used exclusively for *religious, hospital* or *charitable* purposes and owned by' (Italics added) certain institutions, likewise authorizes the exemption of all the property of such institutions which is used for educational purposes of any character or grade—more specifically, property used for *schools of less than collegiate grade.* This holding is reached despite the fact that the word 'educational' is notably absent from the 1944 amendment.

"To so construe section 1c of Article XIII as to encompass educational purposes, in addition to the 'religious, hospital or charitable purposes' which are expressly designated in the section, *does violence to the plain meaning of the language used, to the intent of the voters who adopted the section, and to settled principles of statutory construction.*

* * * * * * *

[See detailed proof of this point in dissenting opinion]

* * * * * * *

". . . In view of these unusually express and specific designations in the Constitution of the property to which the people are willing to grant tax exemption, it appears to me too clear for serious debate *among jurists following the law*

that if by the provisions of section 1c of Article XIII it was intended to grant exemption to property devoted to educational purposes, then the language used would have said so, clearly and precisely.

* * * * * * *

". . . It is my firm conviction that this court should not, *in the guise of statutory construction, effect an amendment of the Constitution which the voting citizens of California have repeatedly rejected.*

* * * * * * *

"'. . . The provisions of . . . [California's] Constitution are *mandatory and prohibitory,* unless by express words they are declared to be otherwise.' (Const. Art. I, §22.) The justices of this court, regardless of personal views on social, political, economic or *religious* subjects, are *in duty bound to support the Constitution and laws of this state.* 'The powers of the government of . . . California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Contion expressly directed or permitted.' (Const. Art. III, §1.) Obedient to my concept of *judicial duty* I must apply the firmly established principles of construction above delineated, give effect to the *plain intent* and specific language of the framers of section 1c of Article XIII of the Constitution, respect the principle of division of powers of government above quoted, and hold unauthorized the purported exemption of property,

> however laudatory the objectives, wihch is sought to be sustained on the sole basis that the property is 'used exclusively for school purposes of less than collegiate grade'—a use which is not of a character specified in the constitutional authorization, and which is *therefore beyond the power of either the Legislature or this court to write into the Constitution.*" (Emphasis ours)

This, then, is not simply a case where a state court has construed a state statute or decided a question of state law or of local practice. It is a case where the Constitution of California plainly commands that all property in this state shall be taxed unless the Constitution specifies otherwise and where the Constitution *plainly* does not specify otherwise. Thus to use the argument of "construction" in this case to override a constitutional prohibition, expressly inserted to protect the taxpaying public, is to do away with fundamental rights in violation of principles of ordered liberty. The question here is a substantial one. It shocked the sense of constitutional fairness of three justices of the California Supreme Court. It should be presented to the United States Supreme Court for plenary consideration with briefs on the merits and oral arguments for its resolution.

B. The challenged statute grants a million dollar subsidy to religious schools. It removes private real property from the public tax rolls without any limits as to the value or amount of property which may thus be removed and without any restrictions as to whether religious indoctrination or racial and religious discrimination may be conducted in the schools occupying such property. For this reason, a substantial federal question is presented under the Fourteenth Amendment because the statute is vague, indefinite and uncertain and unreasonably discriminates against appellant and all other owners of taxable real property in Alameda County.

As previously stated, the California Constitution *requires* that *all property be taxed unless specifically exempted* by the California Constitution or laws of the United States. *California Constitution,* Article XIII, Section 1. To effectuate this rule, in California and elsewhere, the courts have insisted that constitutional exemption provisions be strictly construed; and that any doubt as to authority be resolved against the proposed exemption, *Berryman v. Board of Trustees of Whitman College,* 222 U. S. 334, 56 L. Ed. 225; *Sutter Hospital v. City of Sacramento,* 39 Cal. 2d 33, 244 P. 2d 390; *Pacific Home v. County of Los Angeles,* 41 Cal. 2d 844, 264 P. 2d 539, the aim being to secure the equality of taxation which results from subjecting all property to the same burden. *Watchtower B. & T. Society v. County of Los Angeles,* 30 Cal. 2d 426, 429, 182 P. 2d 178.

The split, 4-3 decision of the California Supreme Court in this case now opens the floodgates to legislative grants of exemption subsidies to undergraduate private and religious schools. This despite the fact that there is no mention whatsoever of such private

schools in the Constitution. This despite the fact the legislative act contains no limitation on the amount or value of such private property which may thus be removed from the tax rolls. And this despite the fact that there are no restrictions whatsoever on the religious indoctrination or racial discrimination which may be practiced in the private schools whose property is thus benefited at the public expense.

In *Shelley v. Kraemer,* 334 U. S. 1, 10, the United States Supreme Court ruled, at page 10:

> "Equality in the enjoyment of property rights was regarded by the framers of that [the Fourteenth] Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

And at page 20:

> "We have noted that freedom from the discrimination by the states in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment."

See also *Oyama v. State of California,* 332 U. S. 633, and *Sei Fujji v. State of California,* 38 Cal. 2d 718, 242 P. 2d 617, where the California Supreme Court says:

> "There can be no question that the rights to acquire, enjoy, own, and dispose of property are 'among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment,' and that the power of a state to regulate the use and ownership of land

must be exercised subject to the controls and limitations of that Amendment."

These cases make clear that there can be no unreasonable discrimination against any person in the direct, annual ad valorem taxation of real property within the dominion of a state, or deprivation of the right to property as guaranteed by the due process clause.

Under the case of *Winters v. People of the State of New York,* 333 U. S. 507, it is also plain that the Due Process clause is violated where the fundamental property rights of our people are in danger of being infringed upon because a state law is too *vague, indefinite,* and *uncertain.* See also *Herndon v. Lowry,* 301 U. S. 242, 264.

The 1951 exemption statute here authorizes carte blanche tax exemption subsidies to *private* property owners such as The Roman Catholic Welfare Corporation of San Francisco. It has no constitutional reference point. It is subject to no constitutional limitation as to where the private properties must be located or what amount of properties may be exempted. It is subject to no limitation as to racial or religious discrimination which the private school properties may condone.

Appellant therefore contends that the 1951 statute deprives all non-exempt real property owners of their fundamental Fourteenth Amendment constitutional rights to equality in the taxation of private real property rights and protection from vague legislation or

court opinions paving the way to exempt real property, always before taxable, and so increase the annual tax rate on the real property owned by appellant, and so compelling him and all other owners of taxable real property to pay taxes to help support private or religious schools, contrary to 14th Amendment as interpreted, construed and applied in *Shelley v. Kraemer,* 334 U.S. 1 and controlling cases, interpreting the 1st and 14th Amendments.

VI. APPELLANT IS ENTITLED TO CHALLENGE THE RULINGS OF THE TRIAL COURT AND THE CALIFORNIA SUPREME COURT IN EXCLUDING ADDITIONAL EVIDENCE OF WHAT IS TAUGHT IN PAROCHIAL SCHOOLS AND WHAT ROMAN CANONICAL LAW PROVIDES ON THE SUBJECT OF SCHOOL ATTENDANCE. APPELLANT IS LIKEWISE ENTITLED TO CHALLENGE THE REFUSAL OF THE CALIFORNIA SUPREME COURT TO MAKE FINDINGS ON THESE FACTS. THIS EVIDENCE DIRECTLY INVOLVES THE FEDERAL QUESTION AND GOES TO PROVE THE UNCONSTITUTIONALITY UNDER THE FEDERAL CONSTITUTION. APPELLANT WAS THEREFORE SERIOUSLY PREJUDICED WHEN THE LOWER COURTS REFUSED TO CONSIDER AND MAKE FINDINGS ON THE EVIDENCE; AND SUCH EVIDENCE MAY NOW BE VIEWED AS THOUGH IT HAD BEEN RECEIVED AND HELD TO HAVE NO BEARING ON THE VALIDITY OF THE STATUTE.

At pages 40-41 of its brief, Intervenor attempts to deal with the proffered proof as though the question merely involved state practice. Intervenor therefore cites a number of irrelevant cases, such as *Lisenba v. California,* 314 U.S. 219, which hold that the United States Supreme Court does not sit to review the evidentiary rulings of state courts. But

the Intervenor's cases have nothing to do with our situation. We offered evidence going directly to prove a violation of the United States Constitution. That proffer nevertheless was rejected by the state courts. The latter type of evidence does not simply involve a matter of state practice. It involves the fundamental right of a litigant to present evidence which will demonstrate his contention that the United States Constitution has been violated. If local courts could reject all such evidence and escape having their decisions reviewed on the ground that such evidentiary questions merely concern "state practice," the United States Supreme Court would be powerless to learn the facts in the most glaring violations of the Bill of Rights.

Obviously Intervenor seeks to invoke the wrong rule.

In two cases, *Hans Rees' Sons v. North Carolina ex rel. Maxwell,* 283 U.S. 123, and *Fairmont Creamery Co. v. Minnesota,* 274 U.S. 1, the appellant had offered evidence in the state courts to prove the Federal Constitution had been violated. In each the United States Supreme Court not only took up the evidentiary question, but expressly pointed out that it was *entitled to view the case as though the evidence had been received* and held to have no bearing on the validity of the statute. See also *Gelston v. Hoyt,* 3 Wheat. 246.

Again in the cases of *Merchants National Bank v. Richmond,* 256 U.S. 635, and *Carlson v. Washington ex rel. Curtis,* 234 U.S. 103, the state courts had re-

fused to pass on certain evidence or make findings of fact thereon because of their view that such evidence was immaterial. But, as the Supreme Court pointed out at 256 U.S. 638:

> "But this determination does not relieve us of the duty of examining the evidence for the purpose of determining what facts reasonably might be, and presumably would be, found therefrom by the state court, if plaintiff in error's contention upon the question of Federal law should be sustained, and the facts thereby shown to be material."

In *Brown v. Western Railway of Alabama,* 338 U.S. 294, the United States Supreme Court points out:

> "The assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Similarly, in *Kern-Limerick, Inc., v. Scurlock,* 347 U.S. 110, this court pointed out that the duty rests on the Supreme Court to decide for itself facts or constructions upon which Federal constitutional issues rest. Moreover, in *Niemotko v. Maryland,* 340 U.S. 268, the court said at page 271:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this court is not bound by the conclusions of the lower courts, but will re-examine the evidentiary basis upon which those conclusions are founded."

As we pointed out in the Statement as to Jurisdiction, Mr. Justice Jackson specifically complained in

Everson v. Board of Education, 330 U.S. 1, at page 22, that the record was too meager on the function of the Roman Catholic Sectarian schools and showed only that schools were taught under superintendence of priests and that religion was taught therein. It was because of this problem and in order to show that Roman sectarianism permeates and is infused into the entire process of learning in those undergraduate schools that plaintiff sought to introduce the textbooks and proof of Canonical law in this case. The evidence was clearly relevant and material on the issues under the First Amendment, under the equal protection clause, and under the due process clause for the reasons set forth in earlier portions of this brief. Moreover, the evidence directly refuted the testimony of the Roman Catholic school superintendents that religion took up only a small portion of the school day. Plaintiff laid a full and careful foundation for the introduction of the evidence, and no objection was made on that ground. The situation is simply that the trial court rejected the evidence as irrelevant, and the California Supreme Court refused to accept the evidence at the appellate level or to make findings upon it, though in accordance with its rules the documentary evidence was transmitted to the California Supreme Court. It now has been transmitted to this court.

CONCLUSION.

For the reasons stated, it is respectfully submitted that Intervenor-Appellee's Motion to Dismiss should be denied; that this court should make an order noting probable jurisdiction; and that plenary consideration should be given to the questions, with briefs on the merits and oral arguments.

Dated, San Francisco, California,
November 12, 1956.

Respectfully submitted,
HENRY C. CLAUSEN,
Counsel for Appellant.

(Appendices A, B and C Follow.)

Appendix A

Henry C. Clausen
315 Montgomery Street
San Francisco 4, California
Telephone: YUkon 6-0727
Attorney for Petitioner

Filed June 26, 1956,
William R. Sullivan,
R. J. Bell, S. F., Deputy.

In the Supreme Court of the State of California

S.F. 19,026

Alfred J. Lundberg,
Plaintiff and Respondent,
vs.
County of Alameda, et al.,
Defendants and Appellants,
The Roman Catholic Welfare Corporation of San Francisco (a Corporation),
Intervenor and Appellant.

PETITION OF PAUL W. HEISEY FOR ORDER BRINGING HIM IN INDIVIDUALLY, MAKING HIM A PARTY TO THIS ACTION ON APPEAL, AND PERMITTING HIM TO JOIN IN RESPONDENT ALFRED J. LUNDBERG'S PETITION FOR REHEARING.

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Petitioner, Paul W. Heisey, respectfully requests an order bringing him in, making him a party to this

action on appeal, and permitting him to join in respondent Alfred J. Lundberg's Petition for Rehearing; and in support thereof states:

At all times since January 1, 1950, petitioner has been and now is the owner of real and personal property located in the City of Oakland, County of Alameda, State of California, and is a citizen and resident and taxpayer thereof; and assessed for and liable to pay taxes thereon and therein, as provided by law; and within one year before the commencement of this action paid a tax therein.

As is shown on pages 51, and 87-88 of the Clerk's Transcript on this appeal, which are incorporated herein by reference, plaintiff Alfred J. Lundberg commenced and maintained this action on his own behalf as a citizen, resident and taxpayer of the said city, county and state, and also on behalf of all and singular the citizens and residents and taxpayers of said city and county and state.

Petitioner at all times has been and is aggrieved and situated similarly as plaintiff and one of the class of taxpayers for whom the action above was prosecuted by plaintiff and desires that every legal step be taken and exhausted on appeal to prosecute said action for all purposes and to a final determination.

On June 14, 1956, after the commencement of this action, and while the same was still pending in this Court, the plaintiff herein, Alfred J. Lundberg, died in the City of Oakland, County of Alameda, State of California.

Prior to his said death, said Alfred J. Lundberg was seeking a rehearing in said case in this Court and had authorized and instructed Henry C. Clausen, as his attorney of record in said case, to prepare and file a petition for said purpose; and that said petition had been substantially completed and approved by plaintiff prior to such date of death.

Said Alfred J. Lundberg died testate leaving a will in which the Bank of America, N. T. & S. A., is named executor. On June 18, 1956, James Gallagher, acting as attorney for said bank, informed Henry C. Clausen, attorney for your petitioner, that said bank was unwilling to prosecute or continue this action on behalf of the Estate of said Alfred J. Lundberg; that on June 19, 1956, said bank filed a petition in said Alameda County Superior Court seeking probate of said will and requesting issuance to it of Letters Testamentary; and said petition is set for hearing in said Court on July 2, 1956. The decedent, Alfred J. Lundberg, did desire, however, as is evidenced by the copy of letter, dated May 13, 1953, attached hereto and by him handed to said Henry C. Clausen, that this action be carried, if necessary, to the ultimate appeal and forum.

Notwithstanding this action, said Bank of America moved the Alameda County Superior Court on June 21, 1956, for its order revoking the appointment of Paul W. Heisey as Special Administrator of said Estate; that said bank, through its said attorney of record, once again expressed its opposition to the continuation of this action by a representative of or

on behalf of said Estate of Alfred J. Lundberg; that said motion by said bank was nevertheless denied by said Court on June 21, 1956.

On June 19, 1956, by an order and decree of the Superior Court of the State of California, in and for the County of Alameda duly given and made, petitioner was appointed Special Administrator of the Estate of said Alfred J. Lundberg to prosecute and maintain the action above; that thereupon Special Letters of Administration were issued to petitioner, who thereupon duly qualified as Special Administrator of said Estate and entered upon the discharge of his duties as such Special Administrator; that said Special Letters of Administration have not been suspended, revoked, or discharged and petitioner is now the duly qualified and acting Special Administrator of the Estate of Alfred J. Lundberg, deceased, for the aforesaid purpose, and, as such Special Administrator, has been and now is expressly authorized by order of the said Alameda County Superior Court duly given and made to prosecute this action and to perfect any appeal in respect thereof on behalf of said deceased plaintiff, Alfred J. Lundberg; that by an order of said Alameda County Superior Court duly given and made, on June 19, 1956, petitioner as such Special Administrator, was substituted in the place of said Alfred J. Lundberg as plaintiff in this action.

That the said authority of petitioner as Special Administrator will expire on appointment of the general estate representative, set for July 2, 1956.

lso on June 19, 1956, petitioner as a citizen, resi-
t, taxpayer of said city, county and state, moved
l Court for an order bringing him in individually
a party plaintiff in this action; that by order of
l Court duly given and made on June 19, 1956,
itioner was brought in individually and made a
ty to this action and permitted to prosecute the
ne to a final conclusion as an additional plaintiff
ein; that pursuant to Rule 48(a), Rules on Appeal,
June 20, 1956, a certified copy of said order sub-
uting Paul W. Heisey as Special Administrator in
ce of Alfred J. Lundberg as plaintiff, and a certi-
copy of said order bringing said Paul W. Heisey
individually as an additional party plaintiff in this
ion were presented to this Court; that at said time
uest was made that this Court make like orders
stituting Special Administrator as a party and
nging said Paul W. Heisey in individually as a
ty on appeal.

That petitioner is a proper person to prosecute
s action, said Petition for Rehearing, or further
peal on behalf of himself and said citizens and resi-
nts and taxpayers similarly situated; that out of a
al of 4,804,533 votes cast in the 1952 referendum
ction in this case, 2,363,528 votes were cast against
d referendum; that there is thus illustrated the
le public interest on the part of the citizens, resi-
nts, and taxpayers of this state in establishing the
nstitutional invalidity of the 1951 Amendment to
venue and Taxation Code §214.

That by reasons of the steps already taken and threatened to be taken by said executor named in the will of said Alfred J. Lundberg, there is grave danger that unless petitioner individually is brought into this appeal forthwith and authorized to join in said Petition for Rehearing, and any further appeal or petition for certiorari, such action, the rights of appeal, and the rights under said judgment in favor of Alfred J. Lundberg and the said citizen, resident, taxpayers may be neglected, greatly damaged, or lost thereby.

Wherefore, petitioner prays for an order bringing him in and making him a party to this action on appeal, permitting him to join in respondent Alfred J. Lundberg's Petition for Rehearing, and any further appeal or petition for certiorari to the Supreme Court of the United States if said Petition for Rehearing be denied.

PAUL W. HEISEY,
Petitioner.

HENRY C. CLAUSEN,
Attorney for Petitioner.

State of California,
ty and County of San Francisco—ss.

Paul W. Heisey, being duly sworn, deposes and
ys:

That he is the Petitioner named in the foregoing
etition of Paul W. Heisey for Order Bringing Him
Individually, Making Him a Party to this Action
Appeal, and Permitting Him to Join in Respond-
t Alfred J. Lundberg's Petition for Rehearing.
hat he has read the foregoing Petition and knows the
ntents thereof and that the same is true of his own
nowledge except as to matters that are therein stated
his information or belief and as to those matters
believes it to be true.

Paul W. Heisey.

Subscribed and sworn to before me this 26th day of
ne, 1956.

(Seal)

Zaide Kirtley,
Notary Public in and for the City and
County of San Francisco, State of
California.

Appendix B

Henry C. Clausen
315 Montgomery Street
San Francisco 4, California
Telephone: YUkon 6-0727
Attorney for Plaintiff

Endorsed: Filed Jun. 19, 1956,
Jack G. Blue, County Clerk,
Frank X. Veit, Deputy.

In the Superior Court of the State of California
in and for the County of Alameda

No. 247,407

Department No. 1

Alfred J. Lundberg,
Plaintiff,

vs.

County of Alameda, City of Oakland, et al.,
Defendants.

The Roman Catholic Welfare Corporation of San Francisco, a (California) Corporation,
Intervenor.

AFFIDAVIT IN SUPPORT OF APPLICATION TO SUBSTITUTE PLAINTIFFS.

State of California,
County of Alameda—ss.

Paul W. Heisey, being first duly sworn, deposes and says:

That on June 14, 1956, after the commencement of this action, and while the same was still pending in this Court, the plaintiff herein, Alfred J. Lundberg, died in the City of Oakland, County of Alameda, State of California.

That on June 6, 1956, by a decision of the Supreme Court of the State of California duly given and made, the judgment in this case in favor of plaintiff was reversed; that prior to his said death, said Alfred J. Lundberg was seeking a rehearing in said case in the Supreme Court of the State of California and had authorized and instructed Henry C. Clausen, as his attorney of record in said case, to prepare and file a petition for said purpose; and that said petition had been substantially completed and approved by plaintiff prior to such date of death; and that said petition for rehearing is due to and must be filed in the Supreme Court of the State of California on or before June 21, 1956.

That petitioner is a proper person to prosecute said action, petition for rehearing, or further appeal on behalf of said Alfred J. Lundberg, and said taxpayers similarly situated; and there is danger that, unless appointed forthwith for said purpose, such action, the rights of appeal, and the rights under said judgment may be neglected, greatly damaged, or lost thereby.

That it is necessary that some person be authorized to prosecute said action, petition for rehearing, and any further appeal or petition for certiorari to the Supreme Court of the United States if said petition

for rehearing be denied, and petitioner is a proper person for such purpose and consents so to act.

[That at all times since January 1, 1950, affiant has been and now is the owner of real and personal property located in the City of Oakland, County of Alameda, State of California, and a citizen and resident and taxpayer thereof; and assessed for and liable to pay taxes thereon and therein, as provided by law; that affiant at all said times has been and is aggrieved and situated similarly as plaintiff, and one of the class of taxpayers for whom the action above was prosecuted by plaintiff and desires that every legal step be taken and exhausted on appeal to prosecute said action for all purposes and to a final determination.]

Paul W. Heisey.

Subscribed and sworn to before me this 19th day of June, 1956.

(Seal) Opal C. Hedge,
Notary Public in and for the County of Alameda, State of California.

My commission expires: 7-18-58.

Appendix C

Henry C. Clausen
315 Montgomery Street
San Francisco 4, California
Telephone: YUkon 6-0727
Attorney for Plaintiff

Endorsed: Filed Jun. 19, 1956,
Jack G. Blue, County Clerk,
Frank X. Veit, Deputy.

In the Superior Court of the State of California
in and for the County of Alameda

No. 247,407

Department No. 1

Alfred J. Lundberg,
Plaintiff,
vs.
County of Alameda, City of Oakland, et al.,
Defendants.

The Roman Catholic Welfare Corporation of San Francisco, a (California) Corporation,
Intervenor.

ORDER TO BRING IN PAUL W. HEISEY AS PLAINTIFF.

Paul W. Heisey, having moved this Court for its order bringing himself in as an additional plaintiff

in this action, the Court having heard the evidence, and the Court being fully advised:

It Is Therefore Ordered that said Paul W. Heisey be brought in and made a party to this action and permitted to prosecute the same to a final conclusion as an additional plaintiff herein.

Dated, June 19, 1956.

Charles Wade Snook,
Judge of the Superior Court.